CRIMINAL YEAR SEMINAR

April 20, 2018 - Tucson, Arizona
May 11, 2018 - Phoenix, Arizona
May 18, 2018 - Chandler, Arizona

DUELING PERSPECTIVES: Prosecution & Defense

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CRIMINAL YEAR IN REVIEW – Selected Case Summaries[1]

1. ***State v. Carson*** (February 2018/S.Ct.): A misidentification defense does not preclude a self-defense claim. All that is required to satisfy the "slightest evidence" standard for self-defense is "a hostile demonstration."

2. ***State v. Escalante*** (May 2017/App. D1): Testimony about drug trafficking methods and areas was improper drug courier profile evidence. *Modus operandi* evidence is typically admissible "only when a defendant was found with large quantities of drugs and asserts, in defense, he had no knowledge of the drugs."

3. ***State v. Fischer*** (April 2017/S.Ct.): Trial judge does not technically sit as "thirteenth juror" in deciding motion for new trial, yet the trial judge has broad discretion to weigh the evidence, make credibility determinations, and set aside the verdict even if there is sufficient evidence in the record to support the verdict. An appellate court is not a "fourteenth juror" and does not re-weigh the evidence.

4. ***State v. Haskie*** (August 2017/S.Ct.): DV cold experts may touch upon DV offender characteristics in explaining victim behavior. If permitted, a defendant is entitled to a limiting instruction. Prohibited profile evidence lacks a legitimate purpose other than to suggest a defendant is guilty because he shares characteristics with others.

5. ***State v. Primous*** (May 2017/S.Ct.): A frisk must be based on reasonable suspicion the suspect is involved in criminal activity and is armed and dangerous. Merely being in a high-crime neighborhood and having a friend run away is not RS.

6. ***State v. Scott*** (September 2017/App. D1): Kidnapping charges were not multiplicitous where victim escaped restraint and was momentarily free between the two charged incidents; prior act from 14 years previous properly admitted under Rule 404(b) to rebut defendant's claims of consent and no specific intent.

7. ***Spring v. Bradford*** (October 2017/S.Ct.): Rule 615 (exclusion of witnesses) prohibits providing prospective witnesses with transcripts. Experts are not automatically exempt. The trial court must tailor an appropriate remedy.

8. ***State v. Urrea*** (May 2017/App. D2): Appropriate remedy for Batson challenge includes replacing improperly precluded jurors on the venire or granting a mistrial. The improperly precluded jurors do not necessarily need to be empaneled as jurors.

[1] The opinions expressed in this handout are the opinions of Jonathan Mosher and do not represent the position of PCAO, APAAC, or any other entity or individual.

State v. Carson, 243 Ariz. 463 (2018) (Decided February 2018 by AZ Supremes, trial judge Godoy (Pima County), authoring justice Timmer)

Facts: Antajuan Carson attended a house party in Tucson. Victims SB, JM, and BC also attended. Carson and SB got in a fight in the house. The fight lasted 5 or 10 minutes, and Carson displayed a gun. The fight resumed outside, and several people, including SB and JM, jumped Carson, hitting and kicking him as he was on the ground. Carson pulled out a gun, began swinging it, and eventually fired shots, killing SB and JM, and wounding BC. The gun was never found. A bloody knife was found near SB's body, and a second bloody knife was found inside SB's belt. Neither knife was tested for DNA or fingerprints.

Carson's defense was that he was not the shooter. He also wanted a self-defense instruction. Based on existing case law, the prosecutor objected to the self-defense instruction given the misidentification defense (see, e.g., *State v. Plew*). The trial court declined to give the instruction. Carson was convicted on 2 counts of second degree murder and 2 counts of aggravated assault. The Court of Appeals reversed and remanded the homicide convictions but not the aggravated assault convictions. The Arizona Supreme Court accepted jurisdiction and reversed all of the convictions.

Held:

1. A self-defense instruction is available to a defendant who asserts a misidentification defense. The *Plew* line of cases is overruled. In 2006, the Arizona legislature amended the justification statutes to clarify that they do not excuse criminal conduct, rather they identify conduct that is not criminal. Once the slightest evidence of self-defense is produced, the State has the burden of proving the absence of self-defense as an additional element. This element must be proven, even if the defense asserts a claim of misidentification.

2. In order to satisfy the "slightest evidence" standard for giving a self-defense instruction, the defendant need only show some evidence of "a hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing her life or sustaining great bodily harm."

Key points:

- We have previously been warned to be extremely cautious fighting a crime prevention instruction. Please extend that caution to all justification instructions!

- If your jury will think the crime is justified if they are instructed on the law, don't you think it is even more important to give them the instruction?

- In other words, give the instructions and then argue your case.

State v. Escalante, 242 Ariz. 375 (2017) (Decided May 2017 by Court of Appeals D1, trial judge Bluff (Yavapai County), authoring judge Thompson)

Facts: Police received calls suggesting drug sales at Escalante's Cottonwood apartment. Police surveilled the apartment, which had a video surveillance camera outside, and saw heavy foot traffic. They used this information, plus tips, to get a warrant to place a tracker on Escalante's truck. They saw the truck take a trip to Phoenix, near 35th Avenue and Indian School Road, stay for about 20 minutes and then return.

Police followed the vehicle when it got back to Cottonwood, and after taking several turns (apparently noticing the surveillance), Escalante was stopped for an illegal license-plate light. Officers saw a firearm in his driver-side door. They brought a canine to the scene, who alerted on the door. No narcotics were found. Escalante was arrested. No drugs were found at the scene. About two hours later, another deputy searched the roads along which Escalante had driven before the arrest. He found a bag with white substance laying on the double yellow line in the road. It turned out to be about 50 grams of meth. A later, second search of the truck revealed a digital scale with meth residue.

Escalante was charged with transporting as dangerous drug for sale and 7 other drug and weapon related charges. At trial, the state called multiple officers who testified about drug trafficking methods, as well as "source cities," "drug corridors," and the "known active drug area" of 35th Avenue and Indian School Road. For example, officers testified about use of surveillance equipment by drug dealers, short-term traffic outside homes used for drug dealing, "vehicle indicators" of drug trafficking, and carrying of weapons as a nexus between drug dealing and violence.

Held: Police officer testimony about drug trafficking methods and areas constituted improper drug courier profile evidence. Even if it was modus operandi evidence, that evidence is typically admissible "only when a defendant was found with large quantities of drugs and asserts, in defense, he had no knowledge of the drugs."

Gonzalez is distinguishable. In that case, the defendant denied knowledge of $112,000 worth of drugs in his car. A police sergeant properly testified that drug-trafficking organizations do not typically entrust that quantity of drugs to an unknown transporter. The testimony was not offered to show the defendant was guilty because he fit a drug courier profile. Rather, it established facts about DTO's that undercut the defense theory.

Key points:

1. If you are presenting evidence of what various criminals do, rather than evidence of what the defendant did in your case, you are on thin ice. Think of this as closely related to the impermissible character inference of Rule 404.
2. *Modus operandi* evidence should be narrowly tailored to a proper purpose.

State v. Fischer, 242 Ariz. 44 (2017) (Decided April 2017 by AZ Supremes, trial judge Mullins (Maricopa County), authoring justice Brutinel):

Facts: Defendant Fischer is a former police officer. He visited his step-daughter and her family for Christmas. Defendant and Lee, his step-daughter's husband, stayed up drinking at the kitchen table after everyone went to bed. After 5 a.m., Fischer called 911; Lee was dead from a contact gunshot wound to his head, and Lee was holding Defendant's pistol with his thumb in the trigger guard. Defendant claimed he had disassembled the pistol when he went to his step-daughter's house. The state presented expert testimony about the gun, its position in Lee's hand, gunshot residue, and blood spatter. Defendant was convicted of 2nd degree murder.

The trial judge denied a motion for judgment of acquittal, finding sufficient evidence to support the verdict. Then, Fischer filed a motion for new trial, and the trial court granted the motion on the grounds the verdict was contrary to the weight of the evidence.

The Court of Appeals reversed, finding the trial court abused its discretion in granting Defendant's motion for new trial under Rule 24.1(c). The court of appeals ruled that a trial court should grant a new trial only in the extraordinary case where it is "quite clear that the jury has reached a seriously erroneous result." The court of appeals also conducted an independent examination of the evidence and concluded that the trial court's factual findings were not supported by the record.

The Arizona Supreme Court granted review to consider the proper role of the trial court in deciding whether a verdict is contrary to the weight of the evidence and whether the court of appeals erred in its independent examination of the evidence and conclusion that the trial court abused its discretion.

Held: Under Rule 24.1, a court may grant a new trial if a verdict is contrary to the law or the weight of the evidence. The duty to grant a new trial when the verdict is against the clear weight of the evidence is known as the "thirteenth juror rule." Appellate courts defer to the factual findings of the jury and will generally not set aside a verdict unless no evidence supports it. This means an unjust verdict against the weight of the evidence will stand unless the trial judge intervenes.

The trial court's discretion is not unlimited, nor does the court have unbridled veto power such that it may act as a super juror and overturn a verdict merely because the court personally disagrees with it. However, the trial judge has broad discretion to find the verdict inconsistent with the evidence, to guard against arbitrary verdicts. The judge may weigh the evidence, make credibility determinations, and set aside the verdict and grant a new trial even if there is sufficient evidence in the record to support the verdict. The trial judge should consider all the evidence in light of the judge's experience and training. The judge should explain with particularity why the jury's verdict is against the clear weight of the evidence.

Key Point: How is the trial judge a 13th juror without being a super-juror? Fine line.

State v. Haskie, 242 Ariz. 582 (2017) (Decided August 2017 by AZ Supremes, trial judge Hatch, authoring justice Brutinel): DV cold expert's explanation of counterintuitive victim behaviors was not offender profiling.

Facts: Haskie assaulted his girlfriend, PJ, at a Flagstaff Motel. That same day, PJ wrote a statement for the police explaining Haskie had beaten and strangled her. Physical evidence corroborated the statement. Haskie was arrested a year later, and shortly after his arrest, PJ wrote letters to the prosecutor recanting her statement and saying she was drunk, couldn't remember, and got her injuries in a bar fight.

The State moved to admit the testimony of cold DV expert Dr. Kathleen Ferraro and agreed to limit her testimony to victim behaviors and coping strategies. The trial court limited questioning to a list of proposed questions. At trial, PJ recanted. Dr. Ferraro testified about seemingly counterintuitive victim behaviors, such as victims blaming themselves and changing their stories. She discussed how frequently victims later minimize and deny what happened.

The court of appeals held Dr. Ferrero's testimony was not impermissible profile evidence under *State v. Ketchner*. In *Ketchner*, the expert testified about characteristics common to victims ***and their abusers*** and predicted an abuser's reaction to loss of control in a relationship. Here, Dr. Ferraro's testimony was confined to general behaviors of victims and related issues. The court of appeals also held Dr. Ferraro's testimony vouched for PJ's credibility when she opined that it is very rare for a victim to give a false initial report, but much more common for victims to minimize and deny that it has happened ("That I see in almost every case."), finding harmless error. The Supremes did not grant review on the vouching issue, only the profile evidence issue.

Held: Profile evidence suggests that because a defendant had certain characteristics, a jury should conclude the defendant committed the charged offense. It is improper because of the risk a defendant might be convicted not for what he did, but what others have done. Expert testimony explaining a victim's inconsistent behavior is admissible to aid jurors in evaluating victim credibility. Although evidence about victim behavior may refer to a perpetrator's characteristics, this is not categorically inadmissible. Admissibility is determined by Rules 401-403. Evidence of offender characteristics may be admissible if relevant for a reason other than to suggest that by possessing characteristics, the defendant is more likely to have committed the charged crimes. Such evidence must be closely scrutinized, should not be phrased in "broad, categorical terms," should have empirical support, and if admitted, defendants are entitled to limiting instructions.

Key points:

- Just because you don't use the word profile, doesn't mean it is not profile evidence.
- Just because you refer to the defendant, doesn't mean it is profile evidence
- The issue is analogous to Rule 404(b): do you have a proper purpose beyond merely suggesting defendant is guilty because he does things a guilty person does?

State v. Primous, 242 Ariz. 221 (2017) (Decided May 2017 by AZ Supremes, trial judge Gates (Maricopa County), authoring justice Bolick):

Facts:

Primous was in a high-crime neighborhood, with a baby on his lap, talking with others. Police approached, and one other man ran. Primous stayed put. Police patted him down and found a baggie of marijuana. He was charged and convicted of a misdemeanor and placed on unsupervised probation.

On appeal, the court of appeals held the frisk to be justified, based largely on the fleeing companion.

Issue: Is presence in a high-crime neighborhood, combined with the flight of another individual sufficient to create reasonable suspicion?

Held: No. The Supremes held this understated the personalized and particularized showing required by the Fourth Amendment. Primous was seated with an infant on his lap during the encounter, which took place in broad daylight. The police were there to look for another individual, who was not present. Primous was not hostile, furtive, or uncooperative. Nothing gave rise to a reasonable suspicion Primous was involved in a crime, or that he was armed and dangerous to officers. Nor were he and his companions acting in a way which gave rise to a reasonable suspicion they were engaged in some concerted criminal action.

Interestingly, the Supremes rejected the amici's request to exclude dangerousness of the surroundings as a basis for RS absent a specific attribute of the neighborhood relevant to the particular person and criminal activity under investigation. The Supremes held a dangerous neighborhood will not by itself authorize a pat down, but it is not irrelevant in determining whether a suspect is involved in criminal activity and armed and dangerous.

Key points:

- Aren't the amici correct that what really matters is linking a specific attribute of the neighborhood to the particular person and criminal activity under investigation?

- In other words, bad things happen in all different neighborhoods, and what really matters is what the officer's particularized suspicion is, and whether we are prepared to recognize that suspicion as reasonable.

State v. Scott, 243 Ariz. 183 (2017) (Decided September 2017 by Court of Appeals D1, trial judge Reinstein (Maricopa County), authoring judge Beene):

Facts: In 1999, Scott sexually assaulted his former girlfriend shortly after she ended their relationship. He forced her into her bedroom in their shared apartment, restrained her with duct tape, and sexually assaulted her. After the assault, he gave her his gun and threatened to stab her with a scalpel if she did not kill him. He was sentenced to prison for aggravated indecent assault.

After his release, Scott moved to Arizona and married MN. They divorced in 2011 but shared custody of their children. On Christmas Day of 2013, MN and the kids gathered at Scott's apartment to open presents. Scott forced MN into his bedroom, showed her a handgun, and physically forced MN onto the bed, where he threatened her with the gun to perform sexual acts. A child heard the disturbance, forced open the door, and saw Scott attempting to assault her mother sexually. MN knocked the gun away, but Scott then held a knife to her neck and continued the assault until MN was able to escape to the living room. She paused to grab her daughter, and Scott knocked her down and dragged her back to the bedroom, where he continued the assault until help arrived.

At trial, the judge permitted the State to introduce the 1999 aggravated indecent assault in order to rebut Scott's defense of consent and lack of specific intent. Scott was convicted of 8 out of 14 counts including two counts of kidnapping.

Held:

1. The kidnapping counts were not multiplicitous. Charges are multiplicitous if they charge a single offense in multiple counts. Offenses are not multiplicitous if each requires proof of a fact the other does not. Kidnapping counts are distinct if the original kidnapping concludes with the victim's release from restraint and the victim was restrained anew. Because MN briefly escaped before Scott dragged her back to the bedroom, the kidnapping convictions were not multiplicitous.

2. The trial court did not abuse its discretion in admitting the 14 year-old aggravated indecent assault conviction. The examples listed in Rule 404(b) are not exclusive. Defendant's claims of consent and lack of specific intent opened the door to evidence of similar past wrongdoing. In each crime, Scott assaulted a previous partner, restrained her in a bedroom, menaced her with a weapon, and threatened to kill himself if she called the police. Evidence of the previous similar crime tended to prove he was not acting under a mistaken understanding of consent. As part of its Rule 403 analysis, the court discussed similarity, citing *Schurz* (rather than handling similarity as part of the Rule 404(b) analysis).

Key points:

- 14 year-old act admitted under Rule 404(b). Add to your remoteness string cite.

Spring v. Bradford, 243 Ariz. 167 (2017) (Decided October 2018 by AZ Supremes, trial judge Talamante (Maricopa County), authoring justice Pelander):

Facts: Spring sued her chiropractor Bradford for medical malpractice. Each side hired 2 experts. Before any witness testified, on the first day of trial, the court invoked the Rule with both parties' agreement. Neither party requested an exception for experts.

During the defense case, plaintiff's counsel learned defense counsel had provided his own experts with transcripts of the trial testimony of the plaintiff's experts. The trial court found a violation of its order, but no bad faith. The trial court did not presume prejudice and instead placed the burden on the plaintiff to show actual prejudice. The trial court found plaintiff had not established prejudice and denied a motion to strike, unless opinions at trial varied from opinions disclosed in the expert deposition. The trial court provided two curative instructions relating to the violations of the Rule. The jury returned a verdict for the defense.

Held: Rule 615 applies in both civil and criminal cases to both expert and fact witnesses. The Rule does not automatically exempt experts. Rather, there must be a fair showing that the expert witness is in fact required for the management of the case. Although the rule expressly prohibits witnesses from hearing other witness testimony, the purpose would be frustrated if witnesses were permitted to read other witnesses trial testimony. The presumption of prejudice holding in *State v. Roberts*, 126 Ariz. 92 (1980), does not apply here, because *Roberts* was a criminal case in which the trial court denied a request to exclude witnesses. In *Roberts*, a material fact witness changed his story after listening to trial testimony of two other witnesses.

In *Spring*, the Court held a presumption of prejudice is not necessary in the context of expert witnesses because their reports and pretrial depositions establish a basis for proof of actual prejudice in the form of altered opinions. A rebuttable presumption of prejudice should apply only where a witness's violation of Rule 615 is substantial and makes proving the existence of prejudice nearly impossible. In all other cases, the moving party must prove the violation gave rise to an objective likelihood of prejudice. The trial court did not err in impliedly finding this standard unmet here.

Potential remedies for a violation include contempt, allowing cross-examination about the violation, instructing the jury about the violation, or precluding the testimony.

Key points:

- "[N]othing in this opinion should be construed as limited or interfering with a party's appropriate trial preparation or strategy, including meeting with prospective trial witnesses, generally discussing their anticipated testimony, and readying them for court appearance."

- Best tell your witnesses not to talk to other witnesses about their testimony, and focus witness prep sessions on the questions they may be asked

State v. Urrea, 242 Ariz. 518 (2017) (Decided May 2017 by Court of Appeals D2, trial judge Callahan (Pinal County), authoring judge Espinosa):

Facts: Urrea was stopped for a traffic violation. He consented to a search, and a deputy found over 60 grams of cocaine hidden in the rear cargo area of his vehicle.

Held:

1. Urrea contained his stop was illegally prolonged while the deputy asked him to step out of his car, checked his VIN number, and engaged in discussion. However, law enforcement officers are permitted to remove occupants from a vehicle for safety purposes, a VIN check is a lawful part of a traffic stop, and the ensuing conversation was consensual.

2. The trial court found the State struck three Hispanic jurors without a sufficiently race-neutral justification. The trial court found that three of five challenged strikes were constitutionally invalid. It reinstated the three improperly struck jurors on the venire and ultimately empaneled two of them. Urrea claimed he should have been granted a mistrial. The Court of Appeals held either remedy appropriate under *Batson,* and here the trial court did not abuse its discretion.

3. Urrea claimed the State improperly introduced drug courier profile evidence at trial relating to "the manner in which drug transactions occur and the role of individuals in these transactions, including drug couriers." However, such generalized testimony is admissible modus operandi evidence, not inadmissible profile evidence. Moreover, Urrea's claim was vague and only made for the first time on appeal. With proper foundation, a qualified officer may opine about personal use vs. for sale quantities.

Key points:

1. Trial courts may grant a mistrial if they uphold a *Batson* challenge.

2. Trial courts need not guarantee that an improperly struck juror is empaneled, only that they are re-included on the venire.

3. Be careful: this decision does "not foreclose the possibility of other remedies." Moreover, here Urrea did not make a record that "he would have preferred that any of the improperly struck jurors nevertheless be kept off the jury, nor did he offer any justification for excluding additional jurors."